

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

**JOAN FAULK OWENS and KAREN  
LYNN HUBBARD,**

**Plaintiffs,**

**v.**

**STATE OF ALABAMA DEPARTMENT  
OF MENTAL HEALTH AND MENTAL  
RETARDATION; JOHN HOUSTON;  
OTHA DILLIHAY; HENRY R. ERVIN;  
and MARILYN BENSON,**

**Defendants.**

**CASE NO- 2:07-cv-650**

**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO  
PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO  
STRIKE THE DEPOSITION TESTIMONY OF DAVID PETTY**

**COME NOW** the Plaintiffs, Joan Owens and Lynn Hubbard, and in reply to the Defendants' Response to Plaintiffs' Opposition to Defendants' Motion to Strike the Deposition Testimony of David Petty, state as follows:

1. The Defendants' Response to Plaintiffs' Opposition to Defendants' Motion to Strike the Deposition Testimony of David Petty has no merit and Defendants' Motion to Strike the Deposition Testimony of David Petty should be denied. First, as previously noted, Otha Dillihay is a party-opponent and thus any statements he has made are readily admissible as a non-hearsay admission under Fed. R. Civ. P. 801(d)(2)(A).

2. Secondly, as discussed herein, based on directly applicable Eleventh Circuit precedent, the Deposition Testimony of David Petty is admissible as direct evidence of discrimination by the Defendant Alabama Department of Mental Health and Mental Retardation.

Likewise, based on such precedent Petty's testimony does not fall within an alleged "stray mark" exclusion. Moreover, Defendant Otha Dillihay readily qualifies as a "decision maker" under Eleventh Circuit precedent.

3. The evidentiary admissibility issue before the Court is directly governed by Equal Employment Opportunity Commission v. Alton Packaging Corp., 901 F.2d 920 (11<sup>th</sup> Cir. 1990), as distinguished by Burrell v. Board of Trustees of Georgia Miliary College, 125 F.3d 1390 (11<sup>th</sup> Cir. 1997). Petty's testimony is also readily admissible under Wilson v. City of Aliceville, 779 F.2d 631 (11<sup>th</sup> Cir. 1986) and Miles v. M.N.C. Corp., 750 F.2d 867 (11<sup>th</sup> Cir. 1985).

4. In Equal Employment Opportunity Commission v. Alton Packaging Corp., 901 F.2d 920 (11<sup>th</sup> Cir. 1990), the Eleventh Circuit held that the following statement made by a manufacturing plant manager was direct evidence of intentional discrimination: "[I]f it was his company, he wouldn't hire any black people." In holding the statement admissible as direct evidence of discrimination, the Court in Alton Packaging did not discuss when the statement was made in relation to any of the events or decisions underlying the racial discrimination allegations before the Court. Nonetheless, the reasoning for the Court's decision in Alton Packaging was fully explained in Burrell v. Board of Trustees of Georgia Miliary College, 125 F.3d 1390 (11<sup>th</sup> Cir. 1997), in the context of a "stray remarks" inquiry. According to the Court in Burrell:

EEOC v. Alton Packaging Corp., 901 F. 2d 920 (11<sup>th</sup> Cir., 1990) . . . held that general racially discriminatory statements made by two decisionmakers [sic] constituted direct evidence of those decisionmakers' [sic] failure to promote black employees for discriminatory reasons. Id. at 924. One decisionmaker [sic] had allegedly said that, if it were his company, he would hire no black people; the other allegedly told a black employee that "you people can't do a thing right." We rejected the defendant's argument that because one statement referred to hiring, not promoting - which was the challenged employment action - and the other did not refer to the employment process at all, these statements were not direct evidence. This court wrote: "The statements indicate a decidedly negative attitude toward black people on the part of

the two people responsible for promotions. There is *no reason* to think that those attitudes differ from hiring to promotion.” *Id.* at 924 n. 6 (emphasis added).

***When employers (like the decisionmakers [sic] in Alton), without concern for particulars, make broad, derogatory statements about a gender or a race and, thus, demonstrate a general discriminatory animus toward that protected group, the scope of that evidence can be as broad as the broad statements. These statements - because of their breadth - may obviate the need for inferences about the speaker’s motivation for a wide category of employment decisions, including hiring and promoting practices.***

125 F.3d at 1393 n. 7 (emphasis added).

5. The statements made by Otha Dillihay, according to the deposition testimony of David Petty, readily fit within the “broad, derogatory” statements about a race referred to in Burrell. According to Petty’s sworn testimony, the statements were made by Dillihay while he was serving as the Associate Commissioner for Administration, where he was the manager and director of the central office and concerned the numbers of whites, in general, working in the Central Office of the Department of Mental Health, where the Central Personnel Office is located. Again, to quote Petty:

Q. Did you ever hear Mr. Dillihay make any comments about the number of white people working in the central office at the Department of Mental Health?

A. Yes.

...

Q. What did you hear Mr. Dillihay say?

A. I heard him say something to the effect of this department has so many white people in power positions, it needs more black people in these positions, something to that effect. Don’t quote me on that because - - it was something along those lines.

Q. But you feel reasonably certain that he said something along the lines that there were too many white people working in the department?

...

A. Yes.

Q. Do you feel reasonably certain that he said something along the line that there were more blacks needed in management positions?

A. Yes.

(Plaintiffs' Exhibit 120<sup>1</sup>, Deposition of David Petty, p. 18, lines 1 through 6 and 15 through 20; p. 20, line 21 through p. 21, line 8; p. 21, lines 12 through 16).

6. Moreover, Dillihay made the statements so many times during his employment with the Department that Petty accepted them as Dillihay's firm beliefs.

Q. Other than that statement, did you ever hear Mr. Dillihay make any other statement about white people that you as a white person found offensive or derogatory?

A. I can't give you certain instances or certain times or dates, but there was - - there seemed to be open discussion at times about that whole situation from Mr. Dillihay. And it really just kind of shocked me. And maybe he was just comfortable talking about that kind of stuff. But it seemed that he had no problem voicing his opinion. And I've heard, you know, several times he would just openly say stuff like that.

...

Q. So he made statements similar to what you heard more than once?

A. Yes.

(Plaintiffs' Exhibit 120, Deposition of David Petty, p. 26, line 10 through p. 27, line 1; p. 27, lines 11 through 13).

Q. Was it your impression, Mr. Petty, that Mr. Dillihay wanted to change the department and in particular place more blacks in management positions in the department?

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<sup>1</sup> Unless noted otherwise, all exhibits referred to herein are in the Record before the Court, having been filed in support of Plaintiffs' Memorandum Brief in Opposition to Defendants' Motion for Summary Judgment.

A. Absolutely.

...

Q. And did you reach that impression based upon comments Mr. Dillihay made in your presence?

A. Yes.

Q. Comments similar to those that you previously shared with us?

A. Yes.

Q. That being comments that there were too many whites in the central personnel office?

A. Yes.

...

Q. Did you develop that impression based upon Mr. Dillihay's comments in your presence that more blacks were needed in management positions in the central office?

...

A. Yes.

(Plaintiffs' Exhibit 120, Deposition of David Petty, p. 27, lines 14 through p. 28, line 2; p. 28, lines 15 through 20; p. 29, lines 2 through 12; p. 29, line 18 through p. 30, line 2).

7. Thus, given the broad statements made by Otha Dillihay regarding what he considered the objectionable number of white people working in the Central Office during his employment there, then the scope of the evidence - - i.e., Petty's testimony - - can be as broad as Dillihay's statements. Therefore, given the substantial evidence in this case that the position and qualifications of Departmental Assistant Personnel Manager were drafted by Marilyn Benson, a black female, under the direction and approval of Henry Ervin, a black male, working under the

direction and approval of his direct supervisor, Dillihay, also a black male, and that Benson was encouraged to apply for the job and was eventually awarded the job, then the broad racially-based animus of Dillihay is admissible as direct evidence of discrimination in this case. As noted by the Court in Burrell, “[t]hese statements - because of their breadth - . . . obviate the need for inferences about the speaker’s motivation for a wide category of employment decisions, including hiring and promoting practices.” 125 F.3d at 1193, n. 7.

8. Similarly, in Wilson v. City of Aliceville, 779 F.2d 631 (11<sup>th</sup> Cir. 1986), the Eleventh Circuit held that statements of racial animus made *after* the alleged adverse employment decision are admissible as direct evidence of discrimination. In Aliceville, a black candidate was denied the job of town police chief in early 1982. After bringing suit for discrimination a witness overheard the town mayor state “he wasn’t gonna let no Federal government make him hire no god-dam nigger.” 779 F.2d at 634. In holding the trial court erroneously failed to admit the witness’s statement, the Eleventh Circuit quoted with approval the trial court’s own analysis:

It is admissible on what his attitude was when he turned him down. Presumably, people don’t pick up a racially prejudiced attitude overnight. The jury is entitled to consider that later than 1982, he was referring to the plaintiff as a “goddam nigger.”

. . . .

If the man is prejudiced in late 1982, it’s almost certain he was in early 1982. . . . [P]eople don’t usually pick up racial prejudice overnight.

Id. at 635.

9. So in this case, Otha Dillihay did not just wake up one morning and discover there were too many white people working in the Central Office and more black managers were needed, especially when he repeated such statements during his employment at the Central Office. Dillihay’s statements reflect his broad belief and mind-set that management personnel should be selected based

on the color of their skin instead of, as stated by Dr. Martin Luther King, Jr., the quality of their character, and, further, in this case, knowledge and experience. Certainly, a jury should be allowed to make such a determination including whether such mind-set motivated Dillihay's actions in this case.

10. Finally, similar to this case, in Miles v. M.N.C. Corp., 750 F.2d 867 (11<sup>th</sup> 1985), the Eleventh Circuit held that a manger's discriminatory statements made sometime in 1978 or 1979, when the manager was involved in employment decisions, was admissible to prove racial animus by the employer. According to a witness, at some time during 1978 or 1979 the manager was asked why no blacks were employed and the manager responded: "Half of them weren't worth a shit." 750 F.2d at 874. In holding the statement was admissible, the Eleventh Circuit noted that "any determination of admissibility turns on the nature of the supervisory positions held by [the declarant] throughout the time periods in question." Id. Since the declarant was involved in personnel decisions during such time and, therefore, his statements were "made by an agent about a matter within the scope of his employment." Id. at 875.

11. So too with Dillihay's statements in this case. It is clear from Petty's testimony that Dillihay was serving as Associate Commissioner of Administration when he expressed the racial animus about which Petty testified. (Plaintiffs' Exhibit 120, Deposition of David Petty, p. 14, lines 4 through 9). As Associate Commissioner of Administration, Dillihay was responsible for oversight and management of the Central Office, including the Central Personnel Office where Plaintiffs and Defendants Ervin and Benson worked. (Plaintiffs' Exhibit 110, Deposition of Otha Dillihay, p. 113, lines 12 through 22; p. 14, lines 11 through 21; and p. 117, line 22 though p. 119, line 3). Thus,

Dillihay's remarks were made while he had supervisory oversight and authority over the Personnel Office where the position of Departmental Assistant Personnel Manager was created and filled.

12. Furthermore, Dillihay was a decision maker as defined by Trotter v. Board of Trustees, 91 F. 3d 1449 (11<sup>th</sup> Cir. 1996) since he was directly involved in creating, defining, and filling such position. Indeed, in its reply to the EEOC's discrimination inquiry, the Department twice represented that Otha Dillihay was directly involved in the creation of such position. See Plaintiffs' Exhibit 125 at p. 4 (attached hereto) ("Both Mr. Dillihay and Ms. Lynn reviewed and approved the class specifications for this position."); Plaintiffs' Exhibit 126 at p. 9 (attached hereto) (Again stating that Mr. Dillihay "approved the class specification that was written for the position of Departmental Assistant Personnel Manager.") Dillihay testified that he consented to the creation of the Departmental Assistance Personnel Manager position.

Q. Did you consent to the creation of Departmental Assistant Personnel Manager?

A. Yes.

Q. You did consent?

A. Yes.

(Plaintiffs' Exhibit 110, Deposition of Otha Dillihay, p. 168, lines 17 through 21). Furthermore, according to Dillihay, he and Ervin recommended that the position be approved by Commissioner Houston:

Q. So this position was approved by you, John Houston and Henry Ervin, correct?

A. The position was approved by John Houston, Commissioner. It was recommended by Mr. Ervin and myself for approval.

Q. So you and Mr. Ervin recommended it and John Houston approved it?



A. Yes.

(Plaintiffs' Exhibit 110, Deposition of Otha Dillihay, p. 217, line 19 through p. 218, line 1). In addition, Henry Ervin testified that Otha Dillihay approved the job specification for the position of Departmental Assistant Personnel Manager.

Q. Did Otha Dillihay approve the job specifications for the position of Departmental Assistant Personnel Manager?

A. Yes.

Q. Did Otha Dillihay approve the omission of the substitution provision in those specifications?

A. That was discussed with Mr. Dillihay on several occasions.

Q. I understand. Did he approve it?

A. He approved the job specs as we presented to him.

Q. And the job specs that you presented to him omitted the substitution provision?

A. It did not have substitution as part of the requirement.

(Plaintiffs' Exhibit 108, Deposition of Henry Ervin, p. 193, lines 2 through 17). Furthermore, John Houston testified that he approved the job specification, without change, that was presented to him by Otha Dillihay for the position of Departmental Assistant Personnel Manager:

Q. Did you ever make any changes or proposed changes to the job specification -  
-

A. I don't - -

Q. Let me finish.  
- - for the position of Departmental Assistant Personnel Manager?

A. I don't recall making any changes in the specs.

Q. Who would have presented the job specification sheet for you - - to you?

A. Either Henry or Otha. Probably Otha.

Q. So you believe when you received Plaintiffs' Exhibit 19, if you received it, you - - it was presented to you by Otha Dillihay?

A. It would be one of them. I believe it was Otha.

(Plaintiffs' Exhibit 111, Deposition of John Houston, p. 114, line 15 through p. 115, line 8).

Accordingly, as a matter of law, Otha Dillihay was a decision maker involved in the decision process that led to the creation and development of the position of Departmental Assistant Personnel Manager, which did not allow substitution even though substitution was allowed for positions of equivalent or higher responsibility and pay.

13. In fact, as noted in Plaintiffs' Response to Order (Document 68) recently filed with the Court (as Doc. 78), the Defendants stressed to the EEOC the importance and involvement of the Job Evaluation Committee ("JEC") in the creation and approval of the position of Departmental Assistant Personnel Manager. The Defendants have since retreated from that defense since the JEC never approved the job specification for the position of Departmental Assistant Personnel Manager even though one of the responsibilities of the JEC is to make recommendations regarding the use of substitution of training and experience for established minimum qualifications. See Plaintiffs' Exhibit 124, attached hereto. As discussed in the Plaintiffs' Response, the establishment of the position of Departmental Assistant Personnel Manager was not brought to the attention of the JEC until July 2005, well after the position and its qualifications were established in February 2005. This matter is again brought to the Court's attention regarding Otha Dillihay's discriminatory statements (and, in particular, as they relate to the Plaintiffs' claims of conspiracy) since both Otha Dillihay and Henry Ervin were members of the JEC (in fact, Ervin was the Chairman) and Marilyn Benson was

the Secretary for the JEC. (Plaintiffs' Exhibit 109, Deposition of Marilyn Benson, p. 194, lines 4 through 6; and Plaintiffs' Exhibit 110, Deposition of Otha Dillihay, p. 176, line 14 through p. 177, line 1; p. 179, lines 23 through 25.) All three were involved in the creation of such position but none of the three one brought it to the attention of the JEC until after the Plaintiffs had already made complaints that their civil rights were being violated.

14. Furthermore, the authorities cited by the Defendants in their response to the Plaintiffs' opposition either have no relevance to the evidentiary issue before the Court, or is totally distinguishable. For example, Defendants cite Thomas v. Clayton Co. Georgia, 94 F. Supp. 2d 1330 (N.D. Ga. 2000) to argue that Dillihay's statement was vague and extreme. In Thomas, the issue was one of double-hearsay, i.e., where an individual testifies that he overheard another individual say that a third individual made a certain statement. Specifically, in Thomas, a fifth-grade student "purportedly overheard a comment by Morgan [a teacher] allegedly recounting a prior remark that had been made by Roberts [as assistant principal] out of the presence of [the fifth-grade] student. " In the purported statement Roberts allegedly authorized a police officer to conduct an allegedly illegal strip search. The Court easily held that the statement was inadmissible double hearsay:

[B]ecause the evidence involves a statement within a statement, with both statements being made by out-of-court declarants. . . . [T]his Court would have no problem allowing Morgan to testify that Roberts had told Morgan to conduct a strip search. Morgan, however, has not testified to the above and indeed disputes the statement attributed to her and to Roberts. . . .

94 F. Supp. 2d at 1333. The Court went on to state:

A witness' testimony that he had overheard another person say that Roberts had authorized a strip search in no way enables a finder of fact to conclude, one way or the other, whether Roberts ever made the statement.

94 F. Supp. 2d at 1334-35.

15. The facts and alleged hearsay issue in Thomas bear no resemblance whatsoever to the facts in this case. In this case, David Petty has given sworn deposition testimony that he heard the Defendant, Otha Dillihay, state multiple times in his presence that there were too many white people working in the Central Office and that more blacks were needed in management positions. Thus, Petty is not offering double hearsay (or hearsay within hearsay) testimony. To the contrary, he is offering statements made by a Defendant in this case, made in the Central Office of the Alabama Department of Mental Health while the Defendant, Dillihay, was serving as Associate Commissioner of Administration overseeing the Central Office, including the Central Personnel Office. Clearly, Thomas has no application here whatsoever.

16. Furthermore, as previously noted, the Burrell decision cited by the Defendants actually fully support the Plaintiffs' contention that Dillihay's broad, derogatory statements are readily admissible as they demonstrate a general discriminatory animus toward a protected group and that such statements, because of their breadth, obviate the need for inferences about the speaker's motivation for a wide category of employment decisions.

17. Finally, Defendants' argument that Dillihay's statement has no context because it could have occurred any time during Petty's alleged three-year employment totally misrepresents the record before the Court. Petty clearly and unambiguously testified that the statements were made while Petty was working as the secretary to June Lynn:

Q. Was the statement made while you were working under Mr. Dillihay or Ms. June Lynn?

A. Under Ms. Lynn.

(Plaintiffs' Exhibit 120, Deposition of David Petty, p. 22, lines 21 through 23). As previously noted, Petty served under Ms. Lynn from the time he was hired in November 2004 until Dillihay's transfer

to the Mental Illness division in July 2005, when Petty went to work directly for Dillihay. (See Plaintiffs' Exhibit 120, Deposition of David Petty, p. 17, lines 1 through 10). Furthermore, as previously noted, Petty testified that Dillihay's statements were made while Petty was seated at his desk outside the office of June Lynn. (See Plaintiffs' Exhibit 120, Deposition of David Petty, p. 21, lines 18 through 23; p. 25, lines 1 through 6). Thus, Defendants' contention that the statements could have been made two years following the approval of the job specification is totally unsupported by the deposition of David Petty, who is able to recall that he was working as June Lynn's secretary at the time the statements were made, and that the statements were made as he was sitting at his desk outside of the office of June Lynn, with Otha Dillihay standing next to his desk.

18. Accordingly, for the reasons previously given by Plaintiffs and further given herein, Defendants' Motion to Strike the Deposition Testimony of David Petty should be denied.

Respectfully submitted this the 27<sup>th</sup> day of August, 2008.

s/J. Flynn Mozingo  
J. Flynn Mozingo (MOZ003)  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have filed the foregoing electronically with Clerk of the Court using the ECF/CM system and a copy of the foregoing will be served on the below listed counsel of record via such system on this the 27<sup>th</sup> day of August, 2008:

H.E. NIX, JR.  
Nix, Holtsford, Gilliland,  
Higgins & Hitson, P.C.  
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COURTNEY W. TARVER  
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s/J. Flynn Mozingo  
OF COUNSEL

State of Alabama  
Department of Mental Health and Mental Retardation

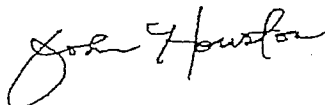
NUMBER: 60-22

SUBJECT: Personnel/Payroll  
TITLE: Job Evaluation Committee

EFFECTIVE: 4/7/89 REVIEWED: CHANGED: 3/5/05

RESPONSIBLE  
OFFICE: Division of Administration/Personnel

APPROVED:



I. POLICY:

The Department of Mental Health/Mental Retardation will establish a Job Evaluation Committee to maintain its exempt classification and pay structure.

II. STANDARDS:

1. The Committee will be responsible for making recommendations to the Commissioner on the following issues:
  - a. Revisions to classification specifications.
  - b. Establishment of new job classifications.
  - c. Salary range adjustments in assigned classifications.
  - d. Substitution of training and experience for established minimum qualification requirements. —
2. The Committee will consist of nine members. Membership shall include:
  - a. The Department's Personnel Director who shall Chair the committee.
  - b. One member appointed by the Associate Commissioner for Administration or designee.
  - c. One member appointed by the Associate Commissioner for Mental Illness.
  - d. One member appointed by the Associate Commissioner for Mental Retardation.
  - e. One member appointed by the Associate Commissioner of Substance Abuse Services.

DMH/MR Policy 60-22

- f. One member appointed by the Commissioner for the Office of the Commissioner.
  - g. The Associate Commissioner for Mental Illness Services or designee
  - h. The Associate Commissioner for Mental Retardation Services or designee
  - i. The Associate Commissioner for Substance Abuse Services or designee
- 3. The job evaluation committee shall be appointed or re-appointed for two (2) year terms.
  - 4. The committee shall meet at least quarterly or as necessary.
  - 5. Issues to be reviewed by the Committee will be submitted by the Commissioner or by an Appointing Authority through the appropriate Associate Commissioner.
  - 6. Issues to be reviewed shall be submitted at least two (2) weeks prior to a scheduled meeting.
  - 7. Minutes of the Job Evaluation Committee meeting will be distributed to the Commissioner, Associate Commissioners, and Facility/Office Directors.
  - 8. Exempt Classification Pay Distribution Notices will be distributed to Associate Commissioners, Facility Directors, and Facility Personnel Managers upon approval by the Commissioner.





BOB RILEY  
GOVERNOR

STATE OF ALABAMA  
DEPARTMENT OF MENTAL HEALTH  
AND MENTAL RETARDATION

RSA UNION BUILDING  
100 N. UNION STREET  
POST OFFICE BOX 301410  
MONTGOMERY, ALABAMA 36130-1410



JOHN M. HOUSTON  
COMMISSIONER

*Keyed 69 (LB)  
6/1/06  
Sa*

*LHB  
F2*

May 31, 2006

Mr. Murry A. Gosa, Intake Supervisor  
U. S. Equal Employment Opportunity Commission  
Birmingham District Office - 420  
Ridge Park Place  
1130 22<sup>nd</sup> Street South, Suite 2000  
Birmingham, AL 35205

RECEIVED  
EEOC

JUN - 1 2006

BIRMINGHAM DISTRICT OFFICE

RE: EEOC Charge No. 420-2006-01123  
Charging Party: Joan E. Owens

Dear Mr. Gosa:

In response to the request for a statement of our position with respect to the issues contained in the above charge, the Department of Mental Health and Mental Retardation (DMH/MR) denies the Charging Party's allegations of discrimination and submits the following:

**CHARGE OF DISCRIMINATION:**

I began my employment with the employer named above as a Personnel Specialist II on December 31, 1990. On September 15, 2005, I was denied the opportunity to apply for the position of Departmental Assistant Personnel Management [sic] which would have been a promotion for me. In the past every announcement in personnel stated that other directly related education and/or experience may be substituted for all or part of the basic requirements upon approval of the Job Evaluation Committee. The announcement for the position of which I am complaining was not written in such a manner. It is my belief that this job announcement was written to fit the educational background of a Black employee assigned to my job classification.

Plaintiffs'  
Exhibit 125

Mr. Murry A. Gosa, Intake Supervisor  
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I believe that I was discriminated against in violation of Title VII of the 1965 Civil Rights Act, as amended because of my race, White.

**RESPONSE:**

The Charging Party was employed by the DMH/MR as a Personnel Specialist II on December 31, 1990, and she is currently a Personnel Specialist III in the Bureau of Human Resources in the Central Office in Montgomery, Alabama. The DMH/MR is a state agency that provides mental illness, mental retardation, and substance abuse services throughout Alabama, which includes operating eight (8) residential treatment facilities. The DMH/MR employs approximately 3,000 employees in a combination of merit and exempt positions. The Charging Party's position of Personnel Specialist III and the position referred to in the above Charge of Departmental Assistant Personnel Manager are both exempt positions.

A Job Evaluation Committee was established by the DMH/MR in 1989 to maintain its departmental exempt classification and pay structure. The classification plan is a grouping of positions that are organized into separate categories involving similar duties and responsibilities. A job description, or classification (class) specification, is written for each position and provides a general description of the duties, responsibilities, and the minimum qualifications in terms of education and experience required to perform the duties. The substitution of experience for education may be allowed for certain positions.

The responsibilities of the Job Evaluation Committee include making recommendations to the Commissioner about revising class specifications, establishing new job classifications, adjusting salary ranges, and substituting training/experience for the required minimum qualifications. The members of this Committee consist of the following DMH/MR employees: Henry Ervin (black), Director, Bureau of Human Resources (formerly referred to as the Personnel Office), who Chairs the Committee; Otha Dillihay (black), Associate Commissioner of the Division of Administration; Susan Chambers (white), Associate Commissioner of the Division of Mental Illness (MI); Eranell McIntosh-Wilson (black), Associate Commissioner of the Division of Mental Retardation (MR); Kent Hunt (white), Associate Commissioner of the Division of Substance Abuse; John Zeigler (white), Director of Public Information, which is under the Office of the Commissioner; Paul Bisbee (white), Director of Mental Illness Facilities; Judith Johnston (white), Director of Mental Retardation Facilities.

If there is not an existing classification for the duties and responsibilities of a position, a class specification is written and sent to the State Personnel Department for

Mr. Murry A. Gosa, Intake Supervisor  
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approval. The State Personnel Department is a separate entity from the Department of Mental Health and Mental Retardation. Pursuant to state law, the State Personnel Department is authorized to perform certain duties, including administering and maintaining a classification plan, and establishing registers for the various classifications within the merit system.

To fill a vacant exempt position within the DMH/MR, approval must be obtained from the Associate Commissioner of the requesting division and the Commissioner of the DMH/MR. An open and competitive process is then followed to select an employee, which includes posting an Announcement of Intent To Fill a Non-Merit Position (which describes the position based on the information in the class specification), accepting applications, and interviewing qualified applicants. Upon completion of the interviews, the interview panel members individually rank the applicants interviewed, the scores are totaled, and the applicants are ranked by numerical score. The appointing authority selects the employee to be hired after considering all of the pertinent information concerning the applicants interviewed, including the interview panels' assessments, the applicant's knowledge, skills, abilities, and past experience relevant to the position.

As previously indicated, the DMH/MR has approximately 3,000 employees, who work in the facilities or regional community services offices throughout the state or in the Central Office in Montgomery. Approximately 1,100 of these employees are in 220 classifications that are exempt from the state merit system. The six (6) DMH/MR facility personnel offices perform personnel service functions such as hiring for merit and exempt positions, appraisals, coordinating disciplinary actions, record maintenance, etc., for the eight (8) facilities operated by the DMH/MR.

The Bureau of Human Resources in the Central Office in Montgomery, in which the Charging Party works, performs these personnel service functions for the employees that work for the Central Office, which includes those individuals based in the regional community services offices throughout the state. In addition to performing these personnel service functions, the Bureau of Human Resources in the Central Office processes the actions of the facility personnel offices and also monitors departmental personnel practices, develops and recommends departmental personnel policies and procedures, and provides technical assistance and back-up support to the facility personnel offices.

Between August, 2003, and September, 2004, six (6) facilities operated by the DMH/MR were either consolidated or closed. The closing of the four (4) personnel offices in these facilities resulted in the Bureau of Human Resources in the Central Office taking over the personnel service functions for the employees based in the regional community services offices throughout the state. Since the facility consolidations/closings, additional functions and other areas of responsibilities have also been assigned to this office.

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Mr. Henry Ervin (black), Director of the DMH/MR Bureau of Human Resources Management in the Central Office, discussed the expansion of the overall responsibilities in this office with his supervisor, Mr. Otha Dillihay (black), Associate Commissioner for the Administration Division, and Ms. June Lynn (white), Executive Assistant and Advisory Attorney to Mr. Dillihay. A determination was made that a position was needed in this office to perform a higher level of responsible professional personnel management work. The employee in this position was to be supervised by Mr. Ervin and assist him in directing the operations of the Bureau of Human Resources Management in the Central Office. Since there was not an existing classification for the duties and responsibilities of this position, a new class specification was written for Departmental Assistant Personnel Manager (Pay Range 80) that includes the minimum educational qualification of a bachelor's degree from a four-year college or university.

The Charging Party states that prior Announcements (which are based on the class specifications) for vacant positions, allowed experience to be substituted for the educational qualification, but the substitution clause was not included in the Announcement for this position. On numerous occasions over a period of time, the DMH/MR Job Evaluation Committee has addressed the issue of substitution, including how it devalues a college degree. The Committee has concluded that substitution should not be allowed for higher level professional positions. Therefore, the class specification for the position of Departmental Assistant Personnel Manager is consistent with the Committee's determination. See e.g., **Exhibit A**, selected Job Evaluation Committee Minutes 2004-2005.

Please note that the State Personnel Department does not have a merit position of Departmental Assistant Personnel Manager; however, attached as **Exhibit B** is a copy of the class specifications for the merit positions of Departmental Personnel Manager I (Pay Range 76), Departmental Personnel Manager II (Pay Range 80), and Departmental Personnel Manager III (Pay Range 85). As can be seen in these descriptions, the minimum qualifications require a bachelor's degree from a four-year college or university and do not allow for substitution of experience for the educational requirements.

Both Mr. Dillihay and Ms. Lynn reviewed and approved the class specifications for this position. Mr. Ervin also met with Mr. John Houston (white), who was Acting Commissioner of the DMH/MR at that time, regarding the establishment of this position and his conversations with Mr. Dillihay and Ms. Lynn. (Mr. Houston was appointed as Commissioner of the DMH/MR effective July 23, 2005.) Mr. Houston also agreed with the minimum qualifications for this position.

Since the State Personnel Department must approve class specifications for new exempt positions, Mr. Ervin provided a copy of the class specification for Departmental Assistant Personnel Manager to Ms. Jackie Graham (white), Deputy Director of State Personnel (now the State Personnel Director), and requested approval to establish this



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new exempt position. Ms. Graham signed Mr. Ervin's memorandum indicating her acceptance of the class specification. Mr. Ervin's memorandum and the class specification are attached as **Exhibit C**.

After the announcement was approved, Ms. Lynn (white) became Acting Associate Commissioner for Administration, for a period when Mr. Dillihay headed the Mental Illness Division. During that time the charging party went to her to attempt to get Ms. Lynn to change the class specification to allow for substitution of experience for a college degree. Ms. Lynn refused to change or suggest changes in the specification as she agreed with the higher valuation of a degree for this position (and others). She informed the charging party that she would not advocate Owens' requested change. Lastly, Mr. Dillihay and Ms. Lynn as Associate and Acting Associate Commissioner, respectively, and Mr. Houston as Commissioner and appointing authority for this position, all insisted that this position would be advertised statewide to get the broadest number of qualified applicants for this position who met the class specification, including the required education.

Attached as **Exhibit D** is a copy of Mr. Ervin's memorandum to Mr. Houston enumerating the reasons to create the position of Departmental Assistant Personnel Manager and requesting his approval to fill the position. Attached to Mr. Ervin's memorandum is the Request To Fill Exempt Position on Staffing Plan, which was approved by Mr. Houston, as well as Mr. Dillihay. This position was announced twice. Initially it was announced between September 15-30, 2005. At the time, the only qualified applicants who applied were three African-American females. Because a wider applicant pool was desired by Ms. Lynn, Mr. Dillihay and Mr. Houston, another announcement was issued, with newspaper advertising, extending the deadline to October 28, 2005. This second announcement did not net any additional qualified applicants. The Announcements posted for this position are attached as **Exhibit E**. Applications were accepted, and the qualified applicants were interviewed and ranked by the members of the interview panel. An individual was selected for this position after consideration of all of the pertinent information concerning the applicants interviewed, including the interview panels' assessments, the applicant's knowledge, skills, abilities, and past experience relevant to the position.

Attached are the following DMH/MR policies as indicated below:

1. DMH/MR Policy No. 60-20, Equal Employment Opportunity (**Exhibit F**)
2. DMH/MR Policy No. 60-22, Job Evaluation Committee (**Exhibit G**)
3. DMH/MR Policy No. 60-92, Exempt Selection Procedure (**Exhibit H**)

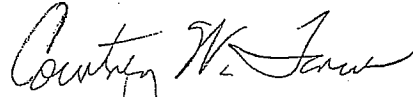


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In conclusion, the DMH/MR again denies the Charging Party's allegations of discrimination. As explained above, an Announcement is based on the class specification for a position. The class specification for the new exempt position of Departmental Assistant Personnel Manager does not allow for the substitution of experience for education, as this is a higher level of responsible professional personnel management work to be performed in the DMH/MR Bureau of Human Resources in the Central Office in Montgomery. It is clear that the DMH/MR Job Evaluation Committee has affirmed that substitution should not be allowed in higher level professional positions. In addition, personnel manager positions within the merit system, which is administered by the State Personnel Department, also do not allow for substitution. The appropriate approvals were obtained for the class specification for the position of Departmental Assistant Personnel Manager, and an open and competitive process was followed to select the individual hired.

If you have any questions or need additional information, please contact Kathy Thompson at (334) 242-3038.

Sincerely,



Courtney W. Tarver  
Deputy Attorney General and Counsel  
Bureau of Legal Services

Attachments

pc: Mr. Otha Dillihay (without attachments)  
Mr. Henry Ervin (without attachments)



BOB RILEY  
GOVERNOR

STATE OF ALABAMA  
DEPARTMENT OF MENTAL HEALTH  
AND MENTAL RETARDATION  
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JOHN M. HOUSTON  
COMMISSIONER

January 18, 2006

VIA FACSIMILE AND OVERNIGHT MAIL

Ms. Sheri Guenster, Federal Investigator  
U. S. Equal Employment Opportunity Commission  
Ridge Park Place  
1130 22<sup>nd</sup> Street, Suite 2000  
Birmingham, AL 35205

RE: (1) Charge No. 420-2006-01123, Charging Party: Joan Owens  
(2) Charge No. 420-2006-01138, Charging Party: Karen Hubbard

Dear Ms. Guenster:

This letter is in response to your request of November 21, 2006, for additional information in the above cases and your letter of January 4, 2007, regarding your analysis of the evidence for both of these Charges. I apologize for the delay in responding to your correspondence; however, please know that the Department of Mental Health and Mental Retardation (DMH/MR) is committed to participating and cooperating in resolving this matter.

The DMH/MR denies the Charging Parties' allegations of discrimination and submits the following response and additional evidence for your consideration. This correspondence will first address your analysis of the evidence set forth in your letter of January 4, 2007, and then provide a response to your requests for additional information, which are listed in your letter of November 21, 2006.

**DMH/MR's Exempt Classification System's Purpose and Background**

The first and overarching point to be maintained about the type of job classification that is at issue in these complaints is that due to the uniqueness of mission of a governmental department like DMH/MR and the difficulty in attaining professionals and maintaining a qualified workforce of professionals and non-professionals therein, given shortages in the healthcare profession in general and mental health professionals and direct care staff in particular; the Commissioner of this department was provided authority to establish a separate, personnel system above and beyond the state merit system. See e.g., Ala. Code §§ 22-50-9, -11

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(19), -11(20), -16 and 40 through-43. These employees outside of the merit system are generally referred to as exempt employees. As such, the Commissioner can and has established various arms to recommend changes to a constantly evolving profession. This includes the human resources professionals that insure the manning of this system and a Job Evaluation Committee consisting of the Department's leaders of the functional divisions of services provided to consumers. They have the flexibility to recommend changes as needed to the job specifications, in their judgment, appropriately staff this mental health, mental retardation and substance abuse service delivery system. Those specifications frequently change and represent permissible factors in hiring under Title VII, such as college degree requirements.

#### **Responses to Your January 4, 2007 Letter**

According to your letter of January 4, 2007, you intend to recommend to the Director of the Birmingham District Office of the EEOC that a finding of reasonable cause be issued in the above Charges. It appears that your findings are based on information relating to the substitution clause that allows education and/or experience to be substituted for all or part of the required minimum qualifications, which may or may not be included in the classification (class) specification for a non-merit (exempt) position within the DMH/MR. The following information is provided to clarify certain statements and dispute the findings set forth in your letter:

Your letter states that "Although Respondent maintains that substitutions are no longer permitted in upper level positions, evidence indicates that after the Departmental Assistant Personnel Management [Manager] position was filled by Benson, Respondent continued to announce upper-level vacancies with substitution clauses." The Announcement for a vacancy is based on the class specification for that position. The fact that the substitution clause is already in the class specification for an existing classification is different than whether the substitution clause is included in the class specification being written during the establishment of a new classification. The following clarification is provided about allowing substitution of education and/or experience for the required minimum qualifications for both new positions being established and existing positions within the DMH/MR exempt system:



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### The Job Evaluation Committee Recommendation for Review of Existing Job Classifications

As explained in our previous response, there are in 220 exempt classifications in the DMH/MR that involve approximately 1,100 of the 3,000 employees. Except for minor revisions, the class specifications for these positions have not been re-written since 1984 when a Wage and Classification Study was performed by the Auburn University at Montgomery (AUM). The members of the DMH/MR Job Evaluation Committee did discuss and agree among themselves that the substitution clause should be removed from the class specifications of higher level classifications, as stated in the Minutes of the Job Evaluation Committee Meeting Held October 27, 2005. However, the Minutes also indicate that the Committee agreed a review of the higher level classification should be performed, and that there was a need for a Wage & Classification Study to be conducted, which would encompass all of the DMH/MR exempt classifications. A copy of these Minutes is attached as **Exhibit A**. (Please note that these Minutes were also attached to the DMH/MR's response dated May 31, 2006, as Exhibit A, along with Minutes of other meetings of the Job Evaluation Committee.) It is also important to remember that this Committee only makes recommendations to the DMH/MR Commissioner, who makes the final decision regarding exempt positions. At this time, the Job Evaluation Committee has not made a recommendation to the Commissioner to have the substitution clause removed from all higher level positions. (See **Exhibit B** for a copy of DMH/MR Policy No. 60-22, Job Evaluation Committee. This policy was attached to the DMH/MR's response dated May 31, 2006, as Exhibit G.)

### The Current Process for Establishing New Job Classifications Such as the Departmental Assistant Personnel Position At Issue

An analysis of the class specifications for the exempt positions within DMH/MR would be a major undertaking; therefore, at this point in time, the Job Evaluation Committee makes its recommendations to the Commissioner on a case-by-case basis **during the process of establishing a new classification** as to whether the substitution clause should be included in the class specification, as was the case with the position of Departmental Assistant Personnel Manager.

In response to your statement that the DMH/MR has continued to announce higher level positions with substitution clauses since Ms. Benson was promoted, a review of the files in the Bureau of Human Resources in the Central Office indicate that no new higher level positions have been established and/or announced since Ms. Benson was promoted effective March 4, 2006. Therefore, the Job Evaluation Committee has not continued to include the substitution clause in the class specifications for new higher level positions. An Announcement for a higher level position was issued after the date of the Announcements for the position of Departmental Assistant Personnel Manager of September 15, 2005. As can be seen from the Announcement for the new classification of Administrator VII dated October 4, 2005, which is attached as

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**Exhibit C**, the substitution clause was not included for this classification. In addition, please note that no one was employed in this classification of Administrator VII.

### **The DMH/MR Exempt Hiring Process**

Our response dated May 31, 2006, provided some background information on the DMH/MR, including the fact that there are six (6) facility personnel offices that perform the personnel service functions for the eight (8) facilities operated by the DMH/MR. The previous response also explains that the hiring process for a vacancy in an exempt position includes issuing an Announcement of a vacancy, accepting applications, and interviewing qualified applicants. The Personnel Office at a facility or in the Central Office coordinates the hiring process for the vacancies in their assigned areas. In addition to the other duties involved in the hiring process, the employee in the Personnel Office in charge of the vacancy makes any necessary changes to the Announcement before it is issued. At this time, the class specifications **for existing positions** within the exempt system have not been analyzed and/or revised to remove or add the substitution clause. Therefore, if the substitution clause is currently included in a class specification, the Announcement issued by the Personnel Office, which is coordinating the hiring process, also includes the substitution clause.

(Please note that the duties of both of the above Charging Parties include the coordination of the hiring process for exempt positions, which, as explained above, involves several duties including writing the Announcement based on the class specification for an existing classification, which may or may not include the substitution clause.)

The employee in the Personnel Office coordinating the hiring process usually also serves as a member of the interview panel, as well as coordinates the selection of the other members of the interview panel. A great effort is made by the Personnel Offices to insure that the members of the interview panels are racially diverse.

Upon completion of the interviews, the members of the interview panel individually rank the applicants interviewed, the scores are totaled, and the applicants are ranked by numerical score. The appointing authority selects the employee to be hired after considering all of the pertinent information concerning the applicants interviewed, including the interview panels' assessments, the applicant's knowledge, skills, abilities, and past experience relevant to the position. If substitution of education and/or experience is necessary for the applicant selected for a position, for which the class specification includes the substitution clause, then the Personnel Office in the facility or within the Central Office sends a request for approval to the appropriate Associate Commissioner before the request is sent to the Bureau of Human Resources in the Central Office. These requests are handled on a case-by-case basis.

The Associate Commissioners of the DMH/MR report directly to the DMH/MR Commissioner and are also members of the Job Evaluation Committee. The Director of the Bureau of Human Resources is supervised by the Associate Commissioner for Administration

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and also chairs the Job Evaluation Committee. The names, races, and titles of the Associate Commissioners and the Director of the Bureau of Human Resources are again provided as follows: (Information about the members of the Job Evaluation Committee was submitted in our previous response.)

<u>Name</u>	<u>Race</u>	<u>Title</u>
Chambers, Susan	Caucasian	Associate Commissioner for the Division of Mental Illness
Dillihay, Otha	African-American	Associate Commissioner for the Division of Administration
Hunt, Kent	Caucasian	Associate Commissioner for the Div. of Substance Abuse Serv.
McIntosh-Wilson, Eranell	African-American	Associate Commissioner for the Division of Mental Retardation

Up until August 2006, the requests to allow substitution for an individual chosen for a position, for which the class specification included the substitution clause, were sent to the Job Evaluation Committee. These requests were also handled on a case-by-case basis by this Committee. See e.g., **Exhibit D** (Minutes of the Job Evaluation Committee Meeting on August 7, 2006).

#### **The Departmental Assistant Personnel Manager Position At Issue**

Your letter of January 4, 2007, states that the lack of a substitution clause for the position of Departmental Assistant Personnel Manager, which was filled by Marilyn Benson, gave her, as the black "candidate," an advantage over the above Charging Parties, who are referred to as the white "candidates." The meaning of the word "candidate" is unclear as it is used in this situation. It is true that the two Charging Parties, along with Ms. Benson, who was the senior (in longevity in her prior and the charging parties' current classifications, as well as, longevity as a DMH/MR) staff member, were already employed in the Bureau of Human Resources of the DMH/MR when the position of Departmental Assistant Personnel Manager was announced; however, an application was received from Ms. Benson for this position, but an application was not received from either of the Charging Parties. The following information is provided regarding the application and interview process for this position:

Our previous response of May 31, 2006, explains that the Announcement for the position of Departmental Assistant Personnel Manager was issued on two different occasions. In response to the first Announcement, applications were received from three (3) qualified

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individuals, who were all female African-Americans. Another Announcement was issued in the hopes of attracting a wider and more diverse group of qualified applicants; however, applications were not received from any other qualified applicants. (See **Exhibit E** for a copy of the two Announcements, which were attached to our May 31, 2006, response as Exhibit E.)

As indicated in the Announcements for the position of Departmental Assistant Personnel Manager, applications were to be submitted to Mr. Mike Mathis, Caucasian, who is the Personnel Director of the W. D. Partlow Developmental Center. Mr. Mathis evaluated the applications received in response to the Announcements for this position, as follows: Four (4) of the seven (7) individuals who submitted an application did not meet the required minimum qualifications, and three (3) individuals met the required minimum qualifications. Information on the seven (7) applicants is provided as follows:

<u>Name of Applicant</u>	<u>Race</u>	<u>Application Assessment Result</u>	<u>Exhibit for Application</u>
Bailey, Tracy	Caucasian	Does Not Meet Min. Requirements	<b>F</b>
Benson, Marilyn	Afric.-Amer.	Meets Minimum Requirements	<b>G</b>
Bivins, Chadwick	Afric.-Amer.	Does Not Meet Min. Requirements	<b>H</b>
Carter, Commie	Afric.-Amer.	Meets Minimum Requirements	<b>I</b>
Coteat, Danielle	Afric.-Amer.	Meets Minimum Requirements	<b>J</b>
Eiland, Jessica	Caucasian	Does Not Meet Min. Requirements	<b>K</b>
Jenkins, Arylin	Afric.-Amer.	Does Not Meet Min. Requirements	<b>L</b>

Number of Applicants by Race That Did Not Qualify for an Interview

2	African-American
<u>2</u>	Caucasian
4	

Each of the three (3) qualified applicants was asked the same job related questions during their interview. (A copy of the interview questions is attached as **Exhibit M.**) Upon completion of each interview, the interview panel members individually ranked the person interviewed. Then, the scores were totaled and the applicants ranked by numerical score. The following information is provided on the members of the interview panel for the position of Departmental Assistant Personnel Manager:

<u>Name</u>	<u>Race</u>	<u>Title</u>
Bennett, David	African-American	Facility Director for Bryce Hospital, a facility operated by DMH/MR

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Chambers, Susan	Caucasian	Associate Commissioner of the Division of Mental Illness, DMH/MR
Hunt, Kent	Caucasian	Associate Commissioner of the Div. of Substance Abuse Serv., DMH/MR
Lunsford, Doug	Caucasian	Manager of Special Projects, State Personnel Department
McIntosh-Wilson, Eranell	African-American	Associate Commissioner of the Div. of Mental Retardation, DMH/MR

The individual who had the highest score, Ms. Benson, was the successful candidate hired for the position of Departmental Assistant Personnel Manager effective March 4, 2006. The interview scores for the three individuals who were interviewed are as follows, in order of highest to lowest numerical score.

Benson, Marilyn	164
Carter, Commie	127
Coteat, Danielle	41

**RESPONSE TO YOUR LETTER OF NOVEMBER, 21, 2006, IN WHICH ADDITIONAL  
 INFORMATION WAS REQUESTED:**

The following information is provided in response to your request for additional information. (Your requests are in bold print.)

- 1. Identify the positions which the Job Evaluation Committee identified as "higher level professional positions."**

The Job Evaluation Committee did not specifically identify the higher level classifications. The Minutes of the meeting on October 27, 2005, indicate that the Job Evaluation Committee referred to the upper level administrative positions as beginning with the Administrator V classification. (See Exhibit A for a copy of these Minutes.) Other upper level positions would include, but not be limited to the following: Administrator VI, Administrator VII, Facility Director I, Facility Director II, Facility Director III, Personnel Manager III, and Personnel Manager IV.



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2. **Provide a copy of the minutes of the Job Evaluation Committee meeting during which it decided to permit no substitution clause for "higher level professional positions."**

As previously indicated, attached as Exhibit A is a copy of the Minutes of the Job Evaluation Committee Meeting Held October 27, 2005, in which the members discussed the substitution clause being removed from the higher level exempt classifications. Please see pages 2 and 3 of this response for clarification of this discussion.

3. **Provide copies of job announcements for all "higher level professional positions" which have been announced since September 15, 2006.**

There have been no announcements issued since September 15, 2006, for a vacancy in a classification that would be considered a "higher level professional position."

4. **Provide the name and race of every person selected for all "higher level professional positions" announced since September 15, 2006, including, but not limited to, the following positions:**
  - a. **Personnel Manager III**
  - b. **Personnel Manager IV**
  - c. **Administrator V**
  - d. **Administrator VI**

As indicated in number 3 above, no announcements have been issued for a vacancy in an upper level administrative classification since September 15, 2006; therefore, no one has been selected for this type of position during this period of time.

5. **For every "higher level professional position" which has been filled since September 15, 2006, provide:**
  - a. **Name and race of each person who applied for each position**
  - b. **Applications, resumes, etc., submitted by each applicant**

No classifications considered "higher level professional positions" have been filled since September 15, 2006.

6. **Provide the name(s), job title(s), and race(s) of the individuals who actually wrote the class specification for the Departmental Assistant Personnel Management position.**

Henry Ervin (African-American), Director of the Bureau of Human Resources Management in the Central Office of the DMH/MR, wrote the class specification for the position of Departmental Assistant Personnel Manager, based on several factors, including the duties to

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be performed and the responsibilities of this position, as well as the education/experience required for similar positions within the merit system administered by the State Personnel Department, which also do not allow for substitution of experience for the educational requirements. Mr. Ervin also discussed and received input from several individuals within the department, as follows:

<u>Name</u>	<u>Race</u>	<u>Title</u>
Benson, Marilyn	African-American	Departmental Assistant Personnel Manager (Formerly the senior Personnel Specialist III in the Bureau of Human Resources)
Dillihay, Otha	African-American	Associate Commissioner for the Division of Administration
Houston, John	Caucasian	Commissioner (formerly Acting Commissioner)
Lynn, June	Caucasian	Executive Assistant and Advisory Attorney for Associate Commissioner for the Div. of Admin.
Mathis, Mike	Caucasian	Personnel Director at W. D. Partlow Developmental Center, a facility operated by the DMH/MR
Tarver, Courtney	African-American	General Counsel and Assistant Attorney General

As indicated in the DMH/MR's response dated May 31, 2006, Mr. Houston (Caucasian), Mr. Dillihay (African-American), and Ms. Lynn (Caucasian) approved the class specification that was written for the position of Departmental Assistant Personnel Manager prior to it being sent to and accepted by Jackie Graham (Caucasian), State Personnel Director (formerly Deputy Director of State Personnel) for approval. (See **Exhibit N** for a copy of the memorandum dated February 3, 2005, documenting Ms. Graham accepting the attached class specification, which was attached to our response of May 31, 2006, as Exhibit C.)

As stated in our response of May 31, 2006, the State Personnel Department is a separate entity from the DMH/MR and was established by state law to administer an employment system that assures an equal employment opportunity for individuals to compete for jobs with state service. The State Personnel Department is authorized to administer and maintain a classification and pay plan for the various classifications within the merit system and must approve the class specifications for new exempt positions.

For your information, the following is also provided:

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The DMH/MR recently accepted a proposal from an experienced public sector compensation consultant to conduct a Wage and Classification Study for its exempt classification system. The contract for these services is pending review/approval by the Legislative Oversight Committee, which should meet in January, 2007. The goal of this study is for the consultant to examine the existing classification structure and pay schedules and make recommendations for improvements. As part of this study, the consultant will develop and document a revised job classification structure for DMH/MR, which will contain the minimum qualifications and requirements, such as education and experience, for each job title. Based upon their review of the consultant's study and recommended improvements, the Job Evaluation Committee will then advise the Commissioner, who will make the final determination for any changes within the DMH/MR's exempt classification system.

### CONCLUSION

In conclusion, the DMH/MR denies that the Charging Parties were discriminated against by not including the substitution clause in the class specification, as it was being written during the establishment of the new classification of Departmental Assistant Personnel Manager. Numerous individuals, both Caucasian and African-American, had input into, reviewed, and approved the classification specification written during the establishment of the new position of Departmental Assistant Personnel Manager. In addition, similar positions within the merit system of employment administered by the State Personnel Department do not include the substitution clause.

The Job Evaluation Committee addresses substitution as it relates to the establishment of a new classification on a case-by-case basis. The only other higher level position established since the classification of Departmental Assistant Personnel Manager is the position of Administrator VII, and this class specification also did not include the substitution clause.

The class specifications for existing positions within the DMH/MR have not currently been revised. Therefore, if the substitution clause was previously in the class specification for an existing position, then substitution is still allowed for that particular position. The Personnel Offices issue Announcements of vacancies that include the minimum qualification requirements for the classification, which is based on the class specification. Since the Charging Parties coordinate the hiring process for exempt positions, including revising the Announcements as needed, they should be aware of these facts.

To summarize, DMH/MR must hire personnel outside the general state merit system due to its unique mission within state government. The Commissioner has the flexibility under state and federal law to establish any legitimate requirements, at any time, for any exempt position. For the position at issue, the Commissioner accepted the recommendation of the department's Job Evaluation Committee, itself diverse in race and gender, made up of the department's leadership, to add a college degree requirement without substitution to a new position being



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created, a DMH/MR Assistant Director of Human Resources. As it turns out, the only qualified applicants for this job were African-American, and, two Caucasian personnel staff who did not apply for the position complain that the specification is racially discriminatory towards them. This subjective view is not a valid basis for finding that impermissible (racial) discrimination was perpetrated against them.

I would appreciate your consideration of the above additional information during the completion of your investigation of these two Charges. Please contact me or Kathy Thompson at the above address or at (334) 242-3038 if you have any questions or need additional documentation.

Sincerely,



Courtney W. Tarver  
Deputy Attorney General  
& General Counsel, DMH/MR

pc: Otha Dillihay (without attachments)  
Henry Ervin (without attachments)